

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

ORIGINAL **77-7091**

To be argued by
VINCENT L. LEIBELL, JR.

**United States Court of Appeals
FOR THE SECOND CIRCUIT**

FORD MOTOR COMPANY,

Plaintiff-Appellant,

against

M.V. "AUSTRAL EXTENTE", her engines,
boilers, etc.,

and against

FARRELL LINES, INC.; UNIVERSAL TERMINAL
and STEVEDORING CORPORATION and FRANK J.
HOLLERAN, INC.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF OF PLAINTIFF-APPELLANT

BIGHAM ENGLAR JONES & HOUSTON
Attorneys for Plaintiff-Appellant
14 Wall Street
New York, New York 10005

VINCENT L. LEIBELL, JR.,
Of Counsel.

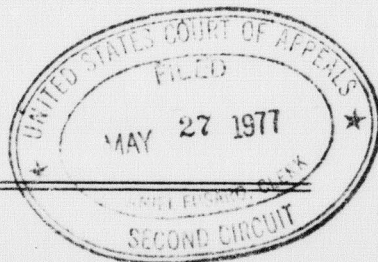


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REPLY BRIEF OF PLAINTIFF-APPELLANT

Having received briefs from each of the two defendants involved in this appeal, as well as one from Farrell Lines, Inc., which is not involved in this appeal, we comment below upon a number of assertions and arguments advanced in those briefs.

Defendants' Interpretation of Bill of Lading Clause 4

None of the defendants discuss the first 35 words of Clause 4(a) which set forth Farrell's stated reasons for wanting to endow third parties with the benefits of its own COGSA-granted \$500.00 per package limitation. Those 35 words—drafted by Farrell—are:

"4. Beneficiaries of Exemptions, etc.—(a) Because of the relationship between them and as the carrier

requires persons and companies to perform or assist it in *performance of work or services undertaken by it in this contract*, it is expressly agreed * * *." (Emphasis ours)

Since Farrell undertook to state its reasons, no one should now be heard to argue for an alleged reason it never stated, that the ocean carrier really desired to extend the limitation benefits to third parties for work performed in connection with other contracts, to which Ford was not a party.

Defendants incorrectly state that plaintiff's position is " * * * that the limitations from liability were not applicable unless damage occurred while work was being performed on the plaintiff's cargo". (Universal's brief, p. 7). Plaintiff's position is that, if the stevedore or lasher had negligently performed their services on the Ford cargo under the bill of lading issued to Ford, they would be entitled to the limitation of liability, whether the damage occurred while the work was being done, or later at sea, provided, of course, that the intention of the parties was clearly expressed. The time of the damage would not be material. Whether or not they performed the negligent services on goods belonging to Ford or another shipper, would be material.

The above incorrect statement of plaintiff's position enables the stevedore to argue that, "Nowhere in Clause 4 is the protection limited only during or while the services are performed on the specific cargo" (Universal's brief, p. 3). The time when the damage occurred is not important. On whose goods the negligent services were performed is important. Plaintiff could argue with greater effect—since it did not draft the terms of the bill of lading issued to Ford—that nowhere in Clause 4 is the \$500.00 per package limitation extended to cover negligence in performing work on cargo, owned by another party, pursuant to another contract.

Defendants' principal argument, in their effort to limit Ford's recovery for damage resulting from the negligent stowage and lashing of the 76,500 pound piece of mining machinery (not owned by Ford), is that they have the *same* exemptions and immunities as the carrier. (Universal brief, p. 4, and Holleran brief, p. 8). These words they extracted from Clause 4(b) and (c) of the bill of lading issued to Ford. (See Schedule "A" at p. 12 of plaintiff's main brief.) Defendants then go on to argue, that since the ocean carrier has the benefit of the limitation of liability regardless of what damaged Ford's cargo, then it follows that they have the *same* benefit. This is a *non-sequitur*.

An ocean carrier's rights and immunities are set forth in COGSA, 46 U.S.C. 1300 *et seq.* As the Supreme Court said in *Herd & Co. v. Krawill Machinery Corp.*, 359 U.S. 297, 301, "The Act (COGSA) is clearly phrased * * *. It imposes particularized duties and obligations upon, and grants stated immunities to, the 'carrier'. * * * It makes no reference whatever to stevedores or agents."

Accordingly, the ocean carrier's benefits and immunities are fixed by statute. This is not so with respect to any claimed benefits and immunities of stevedores and lashers. They can take advantage of only those benefits and immunities of the carrier which are "clearly expressed", for "A bill of lading containing such a limitation will be strictly construed against the parties whom it is claimed to benefit. (Cases cited)" *Toyomenka, Inc. v. S.S. "Tosaharu Maru"*, (2 Cir.) 523 F2d 518, 520, 521.

The real issue presented here is not whether stevedores and lashers may have the *same* benefits and immunities as the ocean carrier (assuming that they are clearly expressed), but rather under what circumstances they may have them. Concededly, the ocean carrier has them during " * * * the period from the time when the goods are loaded on to the time when they are discharged from the ship". COGSA, 46 U.S.C. 1301, Sec. 1(e). However, Clause 4 of

the bill of lading issued to Ford states that the services of others required by the ocean carrier are those necessary in the performance of "this contract" and "this bill of lading" (the bill of lading issued to Ford). Therefore, the stevedore and lasher are entitled to the *same* benefits and immunities as the ocean carrier, only if their negligent services, which caused the loss, were performed on Ford's cargo under the terms and conditions of the bill of lading issued to Ford. Here, their negligent services were performed on another shipper's cargo, pursuant to the terms and conditions of another bill of lading.

Our argument on this point cannot be better expressed than by using the following words of Judge Edelstein in *Cabot Corp. v. S.S. "Mormacscan"*, 298 F.Supp. 1171, 1174:

"Defendant would have the Court stretch the plain meaning of the words 'this contract' to include other cargo loading operations for different shippers under different bills of lading on the rather novel theory that completion of the loading operation for the entire ship would benefit each of the individual shippers. In essence, at the expense of an unsuspecting shipper, the defendant is attempting to extract from a narrow clause of a bill of lading a blanket immunity the penumbrae of which can only be a matter of speculation. But the phrase 'this contract' must be construed strictly and cannot be held to refer to anything but the bill of lading under which Cabot's cargo was to be shipped."

In addition, plaintiff maintains that in a contract of adhesion, such as a bill of lading, it is contrary to public policy to permit a carrier to force a shipper to agree that a third-party is entitled to limit its liability for damage caused to the shipper's goods as a result of negligent work performed upon the goods of another shipper, who is a stranger to plaintiff's bill of lading.

The Similarity Between The Cabot and Ford Bills Of Lading

Defendant Universal claims that "A superficial reading of the *Cabot* case and Farrell Lines 'Himalaya' clauses readily reveals the glaring differences between the two clauses." (Universal brief, p. 5.) Universal does not bother to point out even one of these alleged "glaring differences".

Defendant Holleran claims that the Himalaya clause in the *Cabot* case was "markedly different" from the Farrell bill of lading. (Holleran brief, p. 10) How are they different? Holleran says because the beneficiaries in the *Cabot* case were not specifically identified. (Holleran brief, p. 10) All of which has nothing to do with the fact that both the *Cabot* and *Ford* bills of lading refer only to services undertaken pursuant to "this contract" and "this bill of lading."

True, all the words used in the *Cabot* and *Ford* bills of lading are not the same—but the substance is the same. That is why the defendants have been unable to specify essential differences, and have had to resort to the use of unexplained, extravagant phrases, such as "glaring differences" and "markedly different".

Defendant Holleran's Argument That This Court Rejected The Reasoning Of Judge Edelstein In The Cabot Case When It Affirmed On Another Ground

Defendant Holleran is the only defendant willing to argue for a barren theory that, when this Court affirmed the *Cabot* case on another ground (441 F(2d) 476), it thereby "rejected" the reasoning of Judge Edelstein in the District Court (298 F.Supp. 1171) (Holleran brief, p. 10). Actually, this Court did not find it necessary to reach the point upon which Judge Edelstein decided the case (he would not "stretch the plain meaning of the words

'this contract'"), because this Court found that, "The language in the instant bill of lading does not exhibit the clarity required to extend the limitation of liability to the appellant-stevedore". *Cabot Corporation v. S.S. "Mormacscan"*, 441 F(2d) 476, 478.

So far was this Court from rejecting Judge Edelstein's reasoning, that Judge Hays, at page 478, said:

"One can only guess whether Clause 13" * * * means "initially whether 'all persons rendering services' is designed to include stevedores loading the goods of another shipper". Then, two years later, Judge Timbers quoted, with approval, the same statement of Judge Hays. *Rupp v. International Terminal Operating Co., Inc.*, 479 F(2d) 674, 676, 677. Significantly, even though plaintiff quoted and discussed the statement by Judge Hays (at pages 7 and 8 of its main brief) not one of the three defendants bothered to mention it in their briefs.

To carry the reasoning of Judge Hays a bit further, it seems fair to conclude that the language in a "Himalaya" clause is not "clearly expressed", when it requires one to "guess" whether stevedores and lashers performing work on the goods of another shipper are intended to be included.

**Defendant Holleran's Argument That All Ford
Had To Do Was To Declare A Higher Value On
The Bill of Lading**

This argument, advanced at page 8 of Holleran's brief, begs the question as to whether the stevedore and lasher defendants have the right to the package limitation when their negligent work is performed on goods belonging to another shipper and covered by another bill of lading. If Ford is entitled to recover in full against either, or both, of said defendants why should it pay a higher freight charge for unnecessary coverage? Judge Oakes in *Royal Typewriter Co. v. M.V. "Kulmerland"*, 483 F(2d) 645, 648,

had this to say about the argument that a shipper has an option to obtain "marine insurance coverage, if he prefers the cheaper freight rates of larger packages":

"But we think this approach tends to beg the statutory question of what is a 'package'."

Judge Feinberg, in his dissenting opinion in *Standard Electrica, S.A. v. Hamburg Sud-Amerikanische, etc.*, 375 F(2d) 943, 948, said:

"Thus, finding significance in failure to declare merely begs the question of how to construe the word 'package'."

We think the proper position for defendants to take in this appeal is to meet head-on the important issue raised, rather than to suggest that the plaintiff should have paid more money for coverage than it believes is legally necessary.

* * *

Defendant Holleran argues, at page 8 of its brief, that the frequently repeated Court rulings that bills of lading are "contracts of adhesion" do not apply to the plaintiff because "Ford is not a small shipper". Aside from the fact that Farrell is a common carrier to which small, medium and large shippers may have equal access, the law is intended to treat all alike. Certainly, *Encyclopaedia Britannica, Inc.*, which Judge Anderson found had been victimized by "a contract of adhesion" (a bill of lading), is not a small shipper of books, but rather a very large one doing business in all parts of the world. *Encyclopaedia Britannica, Inc. v. S.S. "Hong Kong Producer"*, (2 Cir.) 422 F(2d) 7, 19.

* * *

Defendants, in what appears to be an effort to cast an anchor to the windward, claim that they do not concede "that the cargo which broke was not in fact cargo owned by plaintiff." (Universal brief, p. 3). All three defendants

made motions for partial summary judgment. Plaintiff produced evidence of the highest order that the cargo, which broke loose and damaged its own cargo, was the 76,500 pound case of mining machinery (p. 17a; Exhibits "1" and "2", at pp. 21a and 23a).^{*} This evidence came from the surveyor representing the ocean carrier. In addition, defendant Farrell, under date of September 5, 1975, wrote "During the voyage the vessel experienced heavy weather and some cargo broke loose which smashed into the Ford Motor Co. equipment" (p. 17a). None of the defendants came forth with any evidence to contradict the evidence supplied by both the ocean carrier and its own surveyor.

* * *

Defendant Holleran argues that since partial summary judgment for Farrell was consented to, it follows that Holleran and Universal are likewise entitled to the package limitation. (Holleran brief, pp. 8 and 9) This is another version of the argument that, come what may, they are entitled to the same limitation as the ocean carrier. In *Toyomenka, Inc. v. S.S. "Tosaharu Maru"*, (2 Cir.) 523 F(2d) 518, where this Court denied the package limitation to an independent contractor, the appeal did not concern the carrier's right to the package limitation.

* * *

Defendant Holleran labels as "frivolous" the plaintiff's additional argument that Holleran is not entitled to the package limitation, because lashers are not named in the "Himalaya" clause, when they might easily have been included. (Holleran brief, page 11) It is hardly frivolous to rely on the exact language of one opinion of the United States Supreme Court and two opinions of this Court (see pp. 10 and 11 of Ford's main brief).

* * *

^{*} References are to pages in the Joint Appendix.

While this reply brief was in the page-proof stage, we learned about a May 19, 1977 opinion of Judge Beeks, sitting in the United States District Court for the District of Oregon. The opinion concerns two consolidated cases (Civil No. 76-11 and Civil No. 76-113), wherein *Mitsubishi International Corporation and The Nippon Fire & Marine Insurance Company, Ltd.*, are plaintiffs, against *S.S. "Eury-medon"* et al., defendants. Copies of this opinion have been sent to opposing counsel. Other copies will be available in Court at the time of argument for members of the Court, if they care to receive them.

Judge Beeks held, that when a stevedore fractured a ballast tank while handling steel plate (not owned by plaintiffs), resulting in salt water damage to other steel goods (owned by plaintiffs), the stevedore, unlike the vessel, could not limit its liability to \$500 per package.

The stevedore claimed that it was entitled to the same package limitation to which the carrier was entitled. The stevedore relied on a "Himalaya" clause which, in pertinent part, stated that it applied "* * * for the purpose or in connection with the performance of any of the Carrier's obligations *under this Bill of Lading*" (emphasis ours). The clause goes on to add, "* * * so that in no circumstances shall any such servant, agent or independent contractor be under any liability greater than that of the Carrier hereunder." (For convenience a copy of this "Himalaya" clause (as quoted at page 3 of Judge Beeks' opinion) is attached hereto as Schedule "B", at page 11 of this brief.

Judge Beeks' ruling on the issue in question is labelled "Conclusion Of Law, No. 4", on page 10 of his opinion. It reads as follows:

"4. Canadian (the stevedore) is not a 'carrier' entitled to the COGSA package limitation. 46 U.S.C. §§ 1301(a), 1304(5). Neither does the Himalaya clause in the applicable bills of lading contractually

confer upon Canadian such a right of limitation. The language of the clause itself, as previously set forth herein, confers upon a stevedore the carrier's defenses and rights of limitation only insofar as such stevedore is undertaking 'the performance of any of Carrier's obligations under *this* Bill of Lading . . . ' (emphasis supplied). Canadian was not performing any services with respect to the Portland cargo and therefore does not come within the terms of the above Portland bill of lading clause. Any attempt to contractually extend a limitation of liability to non-contracting parties is to be narrowly construed to insure that no broader effect is given to it than was contemplated. *See, e.g., Cabot Corporation v. S.S. Mormacscan*, 441 F.2d 476 (2nd Cir.), *cert. denied*, 404 U.S. 855 (1971).''

CONCLUSION

The Order and Judgment of Judge Wyatt (p. 5a) should be reversed, insofar as it limits to five hundred dollars per package the recovery of the plaintiff against defendants Universal and Holleran.

Respectfully submitted,

BIGHAM ENGLAR JONES & HOUSTON
Attorneys for Plaintiff-Appellant
 Office & P.O. Address:
 14 Wall Street
 New York, New York 10005

VINCENT L. LEIBELL, JR.,
Of Counsel.

SCHEDULE "B"

The "Himalaya" Clause quoted by Judge Beeks at page 3 of his opinion.

"4. *Liability of stevedores and others:* Without prejudice to any other provision hereof it is hereby expressly agreed that all servants, agents, and independent contractors (including in particular, but not by way of limitation, any stevedores) used or employed by the Carrier for the purpose or in connection with the performance of any of the Carrier's obligations under this Bill of Lading shall, in consideration of their agreeing to be so used or employed, have the benefits of all rights, defenses, exceptions from or limitations of liability and immunities of whatsoever nature referred to or incorporated herein applicable to the Carrier or to which the Carrier is entitled hereunder, so that in no circumstances shall any such servant, agent or independent contractor be under any liability greater than that of the Carrier hereunder."

(61541)

Due and timely service of Two copies
of the within **BRIEF** is hereby
admitted this 27th day of MAY, 1977

Francis J. Thompson
Attorney for APPELLATE
UNIVERSAL

Julia Sullivan Quinn
ATTORNEYS FOR APPELLATE 99 Quinn
FARMER LINDAS

Ed Bell - Nash
ATTORNEYS FOR APPELLATE 48
HOLLERMAN